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11 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**
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Operating Engineers Local Union No. 3,)	
)	
Petitioner,)	PETITIONER'S OPPOSITION TO
)	
v.)	EMPLOYER'S REQUEST
)	
Mineral Resources, LLC,)	FOR REVIEW
)	
Employer.)	

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16 I. INTRODUCTION

17 The Employer presents three claims in its request for review; only one has merit, but not for the
18 reasons given by the Employer. The first claim is that the Regional Director was clearly
19 erroneous in finding that the Employer failed to meet its burden of proving that the dayshift
20 leadperson is statutory supervisor. That claim fails because it is contradicted by ample evidence.

21 Next, the Employer claims that the Regional Director committed prejudicial error by failing to
22 make a determination on the supervisory status of the nightshift supervisor position and Casey
23 Neely. Petitioner agrees that the record offers sufficient evidence concerning both Mr. Neely
24 and the nighttime lead person position, also known as the nighttime supervisor or evening

1 manager, to permit the Regional Director to make these findings. On those points, however,
2 Petitioner submits that the evidence is overwhelming that the position is not a statutory
3 supervisor nor was Mr. Neely and the Regional Director should have so ruled. Moreover, to the
4 extent the Regional Director felt that the Employer failed to introduce sufficient evidence on
5 these points, he was bound to rule against the Employer.

6 The Employer's third claim is that the Board should review and re-open the Region's
7 administrative investigation into alleged supervisory taint with respect to the showing of interest.
8 Petitioner disagrees with this claim wholeheartedly. There is no basis to presume that the
9 Region's investigation was flawed or inadequate and, notably, the Employer provides nothing
10 that would put that legitimacy in doubt.

11 II. ARGUMENT

12 A. Governing Law

13 The burden of proving that an employee is a statutory supervisor rests with the party asserting
14 such status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). That party must not
15 only prove that employee holds authority in at least one of twelve supervisory functions listed in
16 Section 2(11), but also must show that the employee exercises independent judgment in carrying
17 out said function(s) and does not merely act due to company routine, procedure or policy.
18 *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). This is a "significant qualification."
19 *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 920 (1991). "In adding this limitation,
20 Congress intended to withhold sec 2(11) supervisory status from straw bosses, leadmen, and
21 other low-level employee having modest supervisory authority." *Id.* (citations and quotations
22 omitted).

1 The Board has warned against construing supervisory status too broadly “because the employee
2 who is deemed a supervisor is denied rights which the Act is intended to protect.” *Id.* at 688;
3 *Holly Farms Corp. v. NLRB* 517 U.S. 392, 399 (1996); *Chevron Shipping Co.*, 317 NLRB 379,
4 381 (1995). Thus, a stiff burden faces any employer to show supervisory status. *AVI*
5 *Foodsystems, Inc.*, 328 NLRB 426 (1999). This is made more difficult given that the burden
6 must be proven by a preponderance of the evidence. *Dean & Deluca*, 388 NLRB 1046, 1047
7 (2003). Mere inferences or conclusory statements unsupported by detailed, specific evidence are
8 insufficient to establish supervisory authority. *Chevron, USA*, 309 NLRB 59 (1992); *Sears,*
9 *Roebuck & Co.*, 304 NLRB 193 (1991). Stated differently, what is required to prove supervisory
10 status is “evidence of actual existence of such authority.” *Oil Workers v. NLRB*, 445 F.2d 237,
11 243 (D.C. Cir. 1971). **As the Board has made quite clear, “whenever evidence is in conflict**
12 **or otherwise inconclusive on particular indicia of supervisory authority, it will find that the**
13 **supervisory status has not been established....”** *Phelps Community Medical Center*, 295
14 **NLRB 486, 490 (1989).** Moreover, in this case the testimony of James Doering is entitled to
15 great weight as he is a current employee testifying contrary to his employer’s claims and against
16 its interests. *Shop-Rite Supermarket, Inc.* 231 NLRB 500 (1977).

17 B. The Employer Failed to Show the Day Shift Leadman Position is a Statutory Supervisor

18 Both Doering and Neely occupied the day shift leadman position before they moved to the
19 nightshift. The record is replete with testimony from both men that while in that position, they
20 never possessed, exercised, or were authorized to exercise any of the indicia of supervisory
21 status. (Tr. 213-215; 251-261)¹ This testimony was validated by the *Employer’s* witness

¹ Excerpts to the hearing transcript in this matter are attached hereto as Exhibit A.

1 Raymond Briseno who confirmed the dayshift leadman's lack of authority to fire, hire,
2 discipline, promote, lay off, or transfer employees. (Tr. 187-188).

3 Moreover, with respect to assignment and direction of other employees, both Doering and Neely
4 testified that all employees attend a shift change meeting where information is passed from one
5 shift to the next and where special instructions are passed down from management. (Tr. 214)
6 "[T]ransmitting instructions from management and any information from employees back to
7 management, standing alone, does not make him a supervisory for purposes of the Act." *Injected*
8 *Rubber Products Corp.*, 258 NLRB 687 (1981); *American Feather Products Corp.*, 248 NLRB
9 1102 (1980); *S.D.I. Operating Partners*, 321 NLRB 111 (1996). The routine nature of the
10 operation of the facility and the duties of each position, testified by both witnesses for the
11 Petitioner and Employer alike, underscores the lack of assignment and direction. (Tr. 125, 127,
12 213, 255). Also, work assignments of a routine nature to equalize workload and address
13 production demands do not require the exercise of independent judgment. *Ohio Masonic Home*,
14 295 NLRB 390, 395 (1989); *Providence Hospital*, 320 NLRB 717, 729 (1996) (Section 2(11)
15 supervisory authority does not include the authority of an employee to direct another to perform
16 discrete tasks stemming from the directing employee's experience, skills, training, or position."").
17 Instruction "dictated solely and routinely by the specific demand of each production job" does
18 not a supervisor make. *Print-O-Stat, Inc.* 247 NLRB 272 (1980).

19 Given the wealth of evidence supporting the Regional Director's determination that the
20 Employer failed to carry its burden of showing that the day shift leadman position is a statutory
21 supervisor, its request for review should be denied.

1 C. The Employer Failed to Prove that the Nightshift Supervisor Position is a Statutory
2 Supervisor

3 Throughout the hearing, the terms “night shift supervisor” and “night time leadman” and even
4 “evening manager” were used interchangeably by the parties to identify the position held on the
5 night shift first by Carey Neely and then, after his termination, by James Doering. (Tr. 14-15,
6 33-34, 60, 70, 72, 130, 204, 235-236, 245, 249). Between the two men, the record contains
7 testimony as to the duties and authority of the night shift supervisor position for some five
8 months, from December 2013 through the date of the hearing. Their testimony shows quite
9 clearly that the night position, irrespective of its name, is not a 2(11) supervisor.

10 Mr. Doering testified that he was told his duties on the night shift would be exactly the same as
11 those he had as a day shift leadman. (Tr. 205) In addition, during his brief tenure in the position
12 no one told Doering that he had any of the indicia of supervisory authority nor did he exercise
13 any of the authority that denotes a Section 2(11) supervisor. (Tr. 205-208). And, just like his
14 day shift position, Doering testified that on the night shift he did not direct employees. Instead,
15 he followed the instructions of the Plant Manager and handled mundane tasks as they always
16 have and according to prescribed methods. (Tr. 208-209).

17 For his part, Neely, who was in night time leadman job for four months testified that, he did not
18 have the authority to:

19 •Transfer employees (Tr. 252)

20 •Discipline, discharge, or suspend (nor did anyone tell him he had the authority or consult
21 him on disciplinary matters) (Tr. 252)

1 •Lay employees off (nor was he asked for his recommendation) (Tr. 253)

2 •Recall employees from layoff (nor was he asked for his recommendation) (Tr. 253)

3 •Promote employees (Tr. 253)

4 •Reward employees (Tr. 253)

5 He was also never told that he would be held responsible should another employee not perform
6 his work properly or that he was responsible for resolving employee grievances (Tr. 254)

7 And, just like when he was the day shift leadman, and just like Doering on nights, Neely did not
8 set production, or assign work, and had to seek approval and instructions from management for
9 any operational difficulties he experienced and for guidance on how to respond. (Tr. 254, 259,
10 270) This included such mundane things as fixing machinery and moving piles of sand. (Tr.
11 268-269)

12 Moreover, the two recommendations Neely made while on the night shift were both denied.
13 More specifically, at one point while on the night shift he recommended discipline for another
14 employee. The Plant Manager flatly denied the request and Neely was sternly told, "You're not
15 the boss." (Tr. 260, 279) Also, in response to recommended changes in operations at the plant,
16 Neely was told that if he made any changes he would be terminated. (Tr.260)

17 Thus, Petitioner agrees with the Employer that a decision on the night time lead/supervisor
18 position should have been made by the Regional Director, but submits that the evidence shows
19 that the position is clearly not a supervisor and should be included in the unit that will soon vote.

1 Finally, if the Regional Director believed the Employer adduced too little evidence for him to
2 decide to exclude this position, then he was compelled to rule that the position be included since
3 it is the party claiming supervisory status that has the affirmative obligation to introduce
4 sufficient evidence. When that does not happen a contrary ruling is called for. *Dean & Deluca*,
5 388 NLRB 1046, 1047 (2003); *Chevron, USA*, 309 NLRB 59 (1992); *Sears, Roebuck & Co.*, 304
6 NLRB 193 (1991). **As the Board has made quite clear, “whenever evidence is in conflict or
7 otherwise inconclusive on particular indicia of supervisory authority, it will find that the
8 supervisory status has not been established....” *Phelps Community Medical Center*, 295
9 NLRB 486, 490 (1989).**

10 D. The Employer Failed to Adduce Sufficient Evidence that Carey Neely a Statutory
11 Supervisor at the Time of His Termination

12 Given the foregoing argument and evidence, there can be no serious argument made that Carey
13 Neely was a statutory supervisor during the last months of his employment whether while he was
14 the day shift leadman or night shift leadman.

15 E. There is no reason to question or re-open the Regional Director’s investigation into
16 supervisory taint

17 The Employer’s request to re-open, examine, and augment the Regional Director’s conclusion
18 that there was no supervisory taint with respect to Petitioner’s showing of interest is
19 inappropriate. Such investigations are administrative matters left to the purview of the Region
20 and the Employer is in no position to second guess the outcome of that investigation nor does it
21 provide any of the evidence it contends that would show the Region made an erroneous decision.

1 III. CONCLUSION

2 For the foregoing reasons, Petitioner Operating Engineers Local Union No. 3 respectfully
3 requests that the Board deny the Employer's request for review in all respects except for ruling
4 that the Employer failed to carry its burden of showing that the nightshift supervisor position and
5 Carey Neely were statutory supervisors. In addition, Petitioner requests that the election in this
6 matter not be stayed pending outcome of the Employer's request for review.

7 Respectfully Submitted,
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10 Dated: May 22, 2014

OPERATING ENGINEERS LOCAL UNION NO. 3

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17 By: 

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19 Attorneys for Operating Engineers Local Union No. 3
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25 Review(final)_MDN.docx

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within entitled cause. The address of my residence or business is 1620 South Loop Road, Alameda, CA 94502. On May 22, 2014, I served the Petitioner's Opposition to the parties listed below by:

- ☐ placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;
- ☐ Certified Mail;
- ☐ Electronic Filing;
- ☒ Email


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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 22, 2014 at Alameda, CA.

Idell Jackson
(Type or print name)


(Signature)